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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EUGENE EWAN MORI, PETITIONER

vs.

MELVIN GITTLEMAN and THE BANK OF N.J.,
AS ADMINISTRATOR PENDENTE LITE OF THE ESTATE
OF EUGENE MORI

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

EUGENE E. MORI
Spring Lake Club Apts.
5400 N.W. 159th Street
Miami, Florida 33014

Petitioner, appearing as Attorney Pro Se

STEVEN D. FLEISSIG, ESQUIRE
Seven Becker Farm Road
Roseland, New Jersey 07068

Attorney in Lower Court for Defendant Gittleman

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EDITOR'S NOTE

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 82-2447

EUGENE EWAN MORI,

Plaintiff,

v.

THE BANK OF NEW JERSEY, etc., et al.,

Defendants.

O P I N I O N

Seymour Wasserstrum, Esq.
102 North Sixth Street
Vineland, New Jersey 08360
Attorney for Plaintiff

Morton R. Branzburg, Esq.
Fellheimer, Eichen & Goodman
216 Haddon Avenue
Westmont, New Jersey 08108
Attorneys for Bank of New Jersey

F I S H E R, Chief Judge.

This motion is brought by defendant, the Bank of New Jersey as Administrator Pendent Lite of the Estate of Eugene Mori, Deceased to dismiss plaintiff's complaint against it for failure to state a claim upon which relief can be granted.

Plaintiff, son of decedent Eugene Mori, owned a 25% undivided interest in certain real property in North

EXHIBIT A

Bergen, New Jersey and decedent's estate owned the remaining 75% undivided interest. Commencing in 1976, defendant paid certain sums, including real estate taxes for the subject property, to the township of North Bergen, which taxes plaintiff was responsible for but refused to pay. This was done to protect the estate's undivided interest in the property.

In 1977, defendant instituted suit in New Jersey Superior Court seeking partition of the property and recovery of the sums owed to the estate by plaintiff. On November 18, 1977, the court issued a Consent Order partitioning the property. Subsequently on February 8, 1979, another Consent Order was issued entering judgment against plaintiff in favor of defendant in the amount of $1,480,000 together with interest of 8% a year. This amount included the sums owned by plaintiff to defendant for paument of plaintiff's share of the real estate taxes. When plaintiff failed to pay the amount of the judgment, a writ of execution was issued directing the Sheriff of Hudson County to levy upon plaintiff's portion of the property. On April 19, 1979, several hours before a scheduled public sale was to

take place, plaintiff filed a voluntary petition under Chapter XII of the Bankruptcy Act, 11 U.S.C. Section 801 et seq. in the United States District Court for the District of New Jersey (hereinafter "Bankruptcy Court") and obtained an automatic stay from the court, thereby staying the Sheriff's sale.

Between April 17, 1979 and May 21, 1979, defendant received tax refund checks from the Township of North Bergen for real estate taxes it had paid on the property for the years 1974 through 1978.1/ Plaintiff's complaint alleges that these checks were payable to him. Copies of resolutions of the Township of North Bergen indicate that refunds of tax overpayments were due for the years 1974 through 1978 on various parcels of land owned by Eugene Ewan Mori, Eugene Ewan Mori c/o Bank of New Jersey Admin. and Eugene Ewan Mori. The complaint further alleges that plaintiff never recieved or endorsed these checks and that defendant recieved and wrongfully misappropriated them without plaintiff's consent, knowledge, or authorization.2/

The total amount of the tax refund was $480,135,71. Defendant retained this amount, listing in the estate's

accounts as an account payable to plaintiff a sum representing plaintiff's 25% minus an amount claimed by Melvin Gittleman, Esq.3/ for legal services rendered to plaintiff for the appeal.4/

Plaintiff was informed of the retention of these funds in a letter from defendant dated June 5, 1979. He never advised defendant either orally or in writing of any objection to this action.

In April, 1979, defendant filed an action in the Superior Court of New Jersey, Law Division, Probate Part, Burlington County (hereinafter "Probate Court"), which had jurisdiction over the administration of the estate, for the settlement of the Third & Intermediate Accounting of the estate. Defendant's affidavit of services filed in connection with this action, described its payment of the real estate taxes owned by plaintiff and its receipt of the tax refund due to the successful appeal.5/ Plaintiff was served with all papers filed by defendant in connection with these proceedings, including the affidavit of services, but never served or filed any written exceptions to the accounting. On June 27, 1979, the Probate Court judge signed a judgement

allowing the account.

The subject of defendant's receipt of the tax refund was again raised in the Bankruptcy Court between September 17, 1980 and November 10, 1980 during hearings regarding confirmation of plans of arrangement under Chapter XII of the Bankruptcy Act. On November 10, 1980, the Bankruptcy Court ordered that defendant set off and pay over to itself, in reduction of its claim against plaintiff, certain sums, including the amount that it had retained as plaintiff's share of the tax refund.

In April, 1981, defendant filed an action in Probate Court for the settlement of the Fourth & Intermediate Accounting of the estate. Defendant's retention of plaintiff's share of the tax refund, the establishment of the amount as an account payable to plaintiff, and the set off of the amount against the debt owed by plaintiff pursuant to the Order of the Bankruptcy Court were set forth in the Fourth Account and in the affidavit of services filed in connection with it. Once more, plaintiff failed to serve or file any written exceptions to this account, although he had

been served with all the necessary papers. A final judgement allowing the Fourth Account was signed by the Probate Court judge on August 25, 1981.

Subsequently, plaintiff filed a compaint in this Court, based upon diversity jurisdiction.6/ Count One of the complaint alleges that defendant, without the consent, knowledge or authorization of plaintiff, wrongfully misappropriated drafts it received which were payable to plaintiff. Count Two alleges that defendant's wrongful misappropriation of plaintiff's funds was a substantial factor contributing to plaintiff's filing his voluntary petition in bankruptcy and that as a result plaintiff has suffered harm to his character and reputation, has sustained substantial cost and expenses, and has suffered severe emotional distress.

Where, as here, the parties have presented matters outside the pleading, a motion to dismiss for failure to state a claim upon which relief can be granted will be treated as a motion for summary judgment. Fed.r.Civ. P. 12(b). Therefore, in addition to taking all of plaintiff's allegations as true and drawing all inferences favorable to him, the Court will grant summary judgement

for defendant only where no genuine issue of material fact exists. Mortensen v. First Federal Savings & Loan Ass'n., 549 F.2d 884 (3d Cir. 1977).

N.J.S.A. 3B:17-8 provides:

> A judgement allowing an account, including a guardian's intermediate account, after due notice, shall be res adjudicata as to all exceptions which could or might have been taken to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and propriety of the investments and other assets, the legality and propriety of the changes in investments or other assets, and the legality and propriety of all matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those in privity with or represented by interested parties except:
>
> a. For the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;
> b. Insofar as exceptions to the account shall be taken and sustained; and
> c. As relief may be had from a judgment in any civil action.
> [emphasis added]

Plaintiff contends that this statute applies to an administrator's final account only and not to an intermediate account. However, the courts of New Jersey

have consistently held that since 1905 the statute has given conclusive effect to intermediate as well as final accounts. See Brauberger v. Sheridan, 7 N.J.Super. 576 (ch.Div. 1950); Van Buren v. Plainfield Trust Co., 130 N.J.Eq. 244 (ch. 1941); Melosh v. Melosh, 125 N.J.Eq. 486 (ch. 1939); City Bank Farmers Trust Co. v. McCarter, 111 N.J.Eq. 315 (ch. 1932); In re Slater's Estate, 88 N.J.Eq. 296 (Prerog. 1917). In re Ackerman's Estate, 23 N.J.Super 316 (App. Div. 1952), cited by plaintiff, offers no support for his position. In that case, an intermediate account was not a bar to subsequent proceedings because the administrator had made overpayments to certain distributees that constituted mistakes in the account. The statute in effect at the time made a specific exception to the rule of res judicata in cases where there was a mistake in the account.

Plaintiff further contends that the doctrine of res judicata should not apply in this case because the action is based on defendant's fraudulent conduct. However, the only type of fraud that will justify the opening of a judgment of account is fraud in the procurement of the judgment. Brown v. Fidelity Union Trust

Co., 126 N.J.Eq. 406 (Ch. 1939). In words particularly appropriate to the case at bar, the Court in Brown stated:

> Counsel for complainants argue that this motion should not be granted because such action might prevent any inquiry into the alleged fraudulent practices of the trustees, or one of them, resulting in the investments in illegal securities, and that an allegation of fraud is always a sufficient basis for such an inquiry. While there is no doubt of this court's inherent jurisdiction in all cases of fraud, it will nor retry issues already disposed of in the orphans court even though the transactions approved by the decree of that court may have been fraudulent, unless the decree itself which is sought to be bacated was the result of such fraud. The fraud which would justify the opening of the decrees in this case is not such fraud as has been alleged, and which alleged fraudulent acts have been approved by those decrees, but fraud in the procurement of the challenged decrees. . .. There is not even a suggestion that the decrees here involved were procured by fraud. The argument cannot avail the complainants. 126 N.J.Eq. at 443-44 [citations omitted].

N.J.Ct.Rule 4:87-7 provides that in an action for the settlement of an account, any interested person may serve upon the accountant written exceptions to any item in, or omission from, the account. Plaintiff, as both a beneficiary and an alleged creditor of the estate, was

an interested pwerson entitled to file exceptions to any of the accounts. See Dunham v. Marsh, 52 N.J.Eq. 831 (1895). As a creditor, plaintiff could have objected to the inclusion in the estate of monies allegedly misappropriated by the administrator. He could have excepted to the items in the Fourth Account that reflected the receipt and retention of those monies. He failed to do so despite the undisputed fact that he was served with all the papers necessary to apprise him of items in, or omissions from, the account and of the action to approve the account. Plaintiff alleges that he had no notice of possible wrongful conduct on the part of defendant until the bankruptcy proceedings. However, those proceedings took place in the fall of 1980, well before the Probate Court action for settlement of the Fourth Account in April 1981. Thus, at the time of the Probate Court action, plaintiff had ufficient notice of defendant's alleged wrongdoing to raise the objection that he has raised in this Court. Since no exceptions were filed, the judgment allowing the Fourth Account is re judicata as to those exceptions plaintiff could have taken, constitutes approval of the legality and propriety

of defendant's actions, and exonerates and discharges defendant from all claims of plaintiff.

Plaintiff argues that his rights against defendant have been preserved by the Bankruptcy Court's order of November 10, 1980 which states in relevant part:

> Any and all rights (if any) of the Debtor, Eugene E. Mori, for surcharge against the Bank of New Jersey as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, are hereby preserved. Nothing contained herein shall be deemed either to negate or create the right of Debtor to bring an action against the Bank of New Jersey in its capacity as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, for surcharge or breach of fiduciary duty, or for any other appropriate cause of action at a future date in a proper forum. Nothing in this Order, furthermore, shall be deemed as a waiver of any of Debtor's rights (if any) against the Bank of New Jersey in its capacity as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, in assertion of a future claim by Debtor against the Bank of New Jersey, as Administrator aforesaid, for wrongful seizure of Debtors funds. Nothing inthis Order shall be deemed to prejudice the future assertion by Debtor against the Bank of New Jersey, as Administrator aforesaid, of other appropriate claims (if any) arising out of the Bank of New Jersey, as Administrator aforesaid, having withheld various funds from Debtor. [emphasis added]

The above provision of the Bankruptcy Court order has no effect on the present action. The order preserved plaintiff's rights to raise his claims in an action subsequent to the

bankruptcy proccedings. However, it did not create any new right in plaintiff to raise claims barred by the doctrine of res judicata. Nothing in the order prevented plaintiff from raising his claims against defendant in the Probate Court action for settlement of the Fourth Intermediate Account. Having failed to do so, plaintiff is barred from raising those claims in this action by the doctrine of res judicata.

I find that no genuine issue of material fact exists. Assuming that all of plaintiff's allegations are true, it is undisputed that plaintiff received notice of the Probate Court proceeding for the settlement of the Fourth Account, that he had notice of possible claims against defendant, that he could have raised those claims by way of exceptions to the accounting but failed to do so, and that final judgment approving the account was entered by the Probate Court.

For the foregoing reasons, defendant's motion is granted. See attached order.

FOOTNOTES

1. A successful tax appeal had been taken in which plaintiff and defendant were represented by Melvin Gittleman, Esq., another defendant in this case. The amount owed Gittlemen by plaintiff and whether he was liable to plaintiff for the wrongful misappropriation of some of the refund checks are also issues in the suit but have no direct bearing on the instant motion.

2. Upon the Court's request, defendant attempted to obtain copies of the cancelled tax refund checks from the Township of North Bergen but was advised that the checks were no longer available to the Township.

3. See note 1, supra.

4. Based upon the allegations of the complaint and statements contained in the affidavit submitted by defendant, it appears that Gittlemen retained certain of the refund checks by virtue of his assertion of a lien for these services.

5. The affidavit of services also notes that had defendant not advanced the payments for plaintiff, the tax appeal would have been dismissed.

6. Plaintiff is a citizen of Florida and defendants are citizens of New Jersey.

EUGENE EWAN MORI,

Plaintiff,

v.

THE BANK OF NEW JERSEY, etc., et al.,

Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 82-2447
(Hon. Clarkson S. Fisher)

REPORT AND RECOMMENDATION

PROCEDURAL HISTORY

This matter is before me on defendant Gittleman's application for reconsideration of my December 6, 1983, recommendation to Chief Judge Fisher in which I suggested a denial of Gittleman's motion for summary judgment.

In the fall of 1983, defendant Gittleman moved for summary judgment. Plaintiff, Mori, countered by moving for more specific answers to certain interrogatories.

While those motions were under advisement, counsel for the parties asked me to delay decision for a period of time in order to afford them time to pursue certain settlement discussions. I agreed to do so.

When the settlement discussions ultimately proved fruitless, I filed a December 6, 1983 Letter Opinion and Report and Recommendation in which I ordered more specific answers to certain of plaintiff's interrogatories. Since I felt it improper to consider a summary judgment in favor of a party who had not provided complete discovery, I recommended a denial of that motion without prejudice.

By letter of December 13, 1983, counsel for defendant Gittleman wrote to the court advising that the more specific answers to interrogatories had already been provided and requesting a reconsideration of the summary judgment motion.

Plaintiff's counsel replied by letter of December 16, 1983. He acknowledged having received more specific answers to the interrogatories and asked for 10 additional days to review them with his client. He also requested the opportunity to present oral argument on the issue of summary judgment if I decided to grant reconsideration.

I decided to grant reconsideration and advised all parties that oral argument would be heard on January 9, 1984. No additional written materials were submitted. Shortly before that date, Mr. Wasserstrum, plaintiff's counsel, telephoned my chambers to advise that his client wished to engage another attorney to represent him. No motion to be relieved as counsel was ever filed by Mr. Wasserstrum.

On January 9, 1984, counsel for defendant Gittleman appeared. Mr. Mori appeared without counsel. When I inquired about Mr. Mori's counsel, he stated that he did not have any. Accordingly, I afforded Mr. Mori the opportunity to offer any oral presentation he wished in order to supplement the legal brief and affidavits which had earlier been supplied by Mr. Wasserstrum.

For the reasons which follow, I respectfully recommend that Gittleman's motion be granted.

DISCUSSION

The entire factual and legal background of this case was discussed and examined in an extensive opinion filed by Chief Judge Fisher on March 16, 1983 (copy attached as Exhibit A to this Report). In that opinion, Chief Judge Fisher granted the motion for summary judgment which had been filed by co-defendant The Bank of New Jersey.

Plaintiff's complaint against defendant Gittleman centers on allegations that Gittleman wrongfully misappropriated certain sums of money. The main basis of Judge Fisher's earlier ruling in favor of New Jersey National Bank was holding that the doctrine of res judicata barred any suits against the Bank, since plaintiff had been a party to the administration proceedings regarding his father's estate and failed to object to the Bank's actions in that proceeding.

Arguing that the sums plaintiff claims were wrongfully misappropriated were part of the sums adjudicated to be proper in the administration

proceedings, Gittleman maintains that res judicata principles entitle him to summary judgment. I agree.

The Affidavit of Melvin Gittleman submitted in support of the within motion and the Affidavit of Vincent J. Gentile filed in support of the earlier Bank of New Jersey's motion establish the following fact:

On or about June 19, 1974, Mr. Gittleman was retained by the plaintiff to represent his interest and the interests of his father concerning real estate tax appeals for numerous parcels of property in the Township of North Bergen of New Jersey. The retainer agreement entered into between the parties is annexed to Mr. Gittleman's Affidavit as Exhibit A. At this time, plaintiff owned an undivided 25 percent interest in the subject properties and his father, who approved of Mr. Gittleman's representation, owned an undivided 75 percent interest therein.

Pursuant to the retainer agreement, Mr. Gittleman proceeded to file appeals from real estate tax assessments for the various properties. As a result of Mr. Gittleman's efforts, substantial reductions in real estate tax assessments for the subject properties were obtained. Moreover, during the course of Mr. Gittleman's investigation of plaintiff's properties, he discovered that taxes were being paid on numerous parcels which the Moris had not owned for many years. Mr. Gittleman was thus able to obtain substantial refunds for these properties, as well. Through Mr. Gittleman's efforts, tax reductions were obtained for years 1974, 1975, 1976, 1977, 1978, 1979 and 1980. Through the 1978 tax year, Mr. Gittleman had obtained assessment reductions for the subject properties in excess of $3 million and tax saving of almost $500,000.00. (See Exhibit H to Mr. Gittleman's Affidavit).

The plaintiff's father died on October 8, 1975. On October 23, 1975, the Superior Court of New Jersey, Chancery Division, Burlington County, Probate Division, issued Letters of Administration Pendente Lite on the father's estate to the Bank of New Jersey. The Court's Order is annexed to Mr. Gittleman's Affidavit as Exhibt B.

Soon after the Bank of New Jersey was appointed Administrator, extensive negotiations and discussions took place between representatives of the Bank and Mr. Gittleman concerning Mr. Gittleman's Affidavit as Exhibit C. This agreement authorized Mr. Gittleman to proceed with the prosecution of the real estate tax appeals for all of the Moris' property in North Bergen. Mr. Gittleman's retainer agreement with the Bank of New Jersey provided that compensation for his legal services would be an amount equal to one-sixth of the actual tax savings obtained, plus out-of-pocket disbursements.

As was noted above, Mr. Gittleman proceeded to represent the Bank and plaintiff in the real estate tax appeals and obtained substantial savings. The Bank of New Jersey, as Administrator, filed an interim application to the Probate Court and, in connection therewith, on or about February 3, 1977, Mr. Gittleman prepared an Affidavit setting forth the sums then due him arising from pre-death services to the decedent. Mr. Gittleman's Affidavit, with accompanying Exhibits, is annexed to his Affidavit as Exhibit D. Mr. Gittleman's fees and expenses were approved by the Court without objection from plaintiff or anyone else.

In early 1977, the Bank of New Jersey instituted an action against plaintiff, and others, in the Superior Court of New Jersey, Chancery Division, Hudson County, based on the Bank's payment of real estate taxes on the Township of North Bergen for tax years 1974 through 1978. The Bank claimed that although the payment of these taxes

was the plaintiff's responsibility, he refused to pay. The Bank paid those sums in order to protect the interests of the estate and to preserve both parties' ability to file tax appeals for the property in question. The Bank sought recovery of those sums along with other amounts due and owing to the estate by the son and also sought to have the land in question partitioned so that the portion representing the estate's interest could be sold.

On November 18, 1977, The Hudson County Court issued a Consent Order partitioning the real property on the basis of 75 percent to the Estate and 25 percent to plaintiff.

Subsequently, on or about February 8, 1979, the Hudson County Court issued a Consent Order in favor of the Bank, as Administrator, and against the plaintiff in the amount of $1,480,000.00, plus interest. This sum included substantial amounts due to the Bank by the plaintiff for 25 percent of the real estate taxes the Bank had to pay during

the past several years.

On January 31, 1979, approximately 8 days prior to the entry of the aforementioned judgment, the plaintiff advised the Bank that he intended to sell his portion of the partitioned land within two weeks and would apply the proceeds of his sale to pay the amount of the judgment. The Bank relied upon the plaintiff's representations and agreed to wait until the sale before enforcing its judgment. When the plaintiff failed to pay as he had promised, the Bank caused a Writ of Execution to issue and a Sheriff's sale was scheduled for April 12, 1979. Based on further representations by the plaintiff to the Bank, the Sheriff's sale was adjourned for one week until April 19, 1979, the plaintiff applied for a temporary restraining order enjoining the Sheriff's sale, but such application was denied. At approximately 10:45 a.m. on that same day, the plaintiff filed a voluntary petition under Chapter XII of the Bankruptcy Act,

11 U.S.C. §§1, et seq., in the United States District Court for the District of New Jersey (Bankruptcy No. B-79-00895), and thereby obtained an automatic stay of the impending Sheriff's sale. The plaintiff's schedules submitted in connection with his bankruptcy proceeding listed assets in excess of $24,000,000.00 and liabilities of approximately $6,600,000.00.

Throughout the proceeding in the Probate matter, the plaintiff bitterly contested the sums being sought by the Bank and those whom the Bank had retained. The plaintiff was at all times a party to the proceedings in his father's estate and was at all times notified of, and in most cases present for, all such proceedings.

Between April 17, 1979 and May 21, 1979, the Bank, as Administrator, received tax refund checks for the real estate taxes paid by it on the subject property for the years 1974 through 1978 in the amount of $448,166.88. During this

five-week time period, Mr. Gittleman advised the Bank that he had retained tax refund checks from the Township in the amount of $31,968.83, by virtue of his assertion of a lien for legal services provided to the son, plaintiff herein, a portion of which had been earned many years earlier but had not been paid by plaintiff.

Prior to the receipt of these tax refund checks, and as a result of the bitter fight being waged by the plaintiff in the Probate proceedings, the Bank requested that Mr. Gittleman accept payment of three quarters of the amount due from the estate for Mr. Gittleman's legal services and seek the balance of one quarter from plaintiff. Mr. Gittleman agreed to this arrangement and this arrangement was explicitly set forth in the applications of the Administrator and, in particular, in the Affidavit of Vincent Gentile annexed to the application for a Third Accounting. The Order to Show Cause and Affidavit are annexed as Exhibits

E and F to Mr. Gittleman's Affidavit and the judgment on the Third Intermediate Account, which approved Mr. Gittleman's fee and made reference to the 75/25 percent split, is annexed to Mr. Gittleman's Affidavit as Exhibit I.

The sums approved by the Probate Court for Mr. Gittleman's fee, as reflected in Exhibit I, were based on the substantial and continual services performed by Mr. Gittleman on behalf of both the estate and plaintiff and were described in extensive detail in the Affidavit Mr. Gittleman presented to the Probate Court. A copy of this Affidavit is annexed to Mr. Gittleman's Affidavit in this matter as Exhibit H. This Affidavit reflects, among other things, that the total savings of the settlements in the tax appeal case was almost $500,000.00 through 1978. The estate's share (three quarters of that amount), was $364,825.53 and the plaintiff's share of such tax saving, through 1978, was therefore $121,608.05. Plaintiff's share of Mr. Gittleman's fees and expenses was $20,410.43.

Previously, the court had approved Mr. Gittleman's fees for pre-death services to the estate in the amount of $4,164.14. (See Exhibit G to Mr. Gittleman's Affidavit). Plaintiff's share of Gittleman's application for his fees and expenses was $1,388.04.

On June 27, 1979, the Probate Court entered its Order approving payment by the estate of three quarters of Mr. Gittleman's fees and disbursements, without reduction (Exhibit I). As is noted in Exhibit I, the fact that the Bank was paying three quarters of Mr. Gittleman's fee and plaintiff was responsible for one quarter is explicitly set forth in the Court's Order.

Moreover, immediately after the five-week period during which the Bank received its tax refund checks, the Bank (per Mr. Gentile) wrote a letter, dated June 5, 1979, to plaintiff advising him of the Bank's retention of certain funds received from the tax refund and also advising of the retention by Mr. Gittleman of the $31,968.83

which is the subject of this lawsuit. That letter is annexed to Mr. Gittleman's Affidavit as Exhibit O. The plaintiff never advised either the Bank or Mr. Gittleman, either orally or in writing, of any objection to the actions which were described in that June 5, 1979 letter. Thus, although the plaintiff was represented by counsel through the Probate proceeding and was served with copies of all of the pleadings and other papers filed by the Bank in that matter, the plaintiff never served or filed written exceptions to any item in or omission from the Third Intermediate Accounting reflecting Mr. Gittleman's fees and never complained about the retention of approximately $31,000.00 by Mr. Gittleman for Mr. Gittleman's fees.

As was briefly noted above, the plaintiff filed for bankruptcy just prior to the scheduled Sheriff's sale of his property. Hearings were held in the bankruptcy proceedings between September 17, 1980 and November 10, 1980 with respect to confirmation of plans of arrangement under Chapter XII

of the Bankruptcy Act.

During these proceedings, the same actions which are being attacked in this lawsuit by plaintiff were litigated in that proceeding and all of the transactions giving rise to this lawsuit were examined in detail in the Bankruptcy Court. Plaintiff was present at the hearing and, at all times, was represented by his counsel in this matter, Seymour Wasserstrum, Esq. Plaintiff never listed as an asset on any schedules submitted to the Bankruptcy Court any cause of action he may have had against Mr. Gittleman.

At present, plaintiff continues to own the properties which formed a part of the tax appeals giving rise to this lawsuit. Nowithstanding the fact that settlements were agreed upon through tax year 1978, the old assessor for the Township of North Bergen reinstituted the assessments in every case on all of the Mori properties in North Bergen. The tax bills for the properties in question are annexed to Mr. Gittleman's Affidavit as Exhibit M. Mr. Gittleman informed plaintiff

of such fact and advised him that if he wished to continue the assessment at the settlement level, further appeals would be required. Mr. Gittleman contacted Mr. Mori by telephone and was authorized and directed by Mr. Mori to file appeals to protect his interests. Mr. Mori, however, was not able to designate the specific lots which he still owned and Mr. Gittleman therefore filed appeals for all of the lots in question, knowing that many of them had been given to the estate as part of the partition action.

Mr. Gittleman appeared before the Hudson County Board of Taxation in connection with these 1979 appeals and he was able to obtain a judgment for that year based on the settlement figures for 1978. This occurred notwithstanding the fact that Mr. Mori had, once again, failed to pay taxes for these properties and was thus legally barred from filing these appeals. (Mr. Mori did not have such luck with the Secaucus tax assessor. There, his failure to pay taxes deprived him of any right to

appeal.)

Plaintiff and Mr. Gittleman spoke about the tax appeal constantly and plaintiff not only knew, but expected Mr. Gittleman to appeal the assessments of the property then owned by him. Annexed to Mr. Gittleman's Affidavit as Exhibit P is a letter from plaintiff to Mr. Gittleman dated September 23, 1980. This letter refers to the amounts Mr. Gittleman received and was still owed by plaintiff, with no apparent objection thereto and with a further note confirming that Mr. Gittleman was authorized to continue to process the tax appeals for Mr. Mori on the properties he still owned. In his Affidavit, Mr. Gittleman computed the sums due him for all tax years in question as follows:

25 percent of total fee and expenses approved by Probate Court	$20,402.11
25 percent of pre-death services and disbursements approved by Probate Court*	$ 1,388.04
TOTAL APPROVED BY COURT	$21,790.15

* For services rendered on behalf of plaintiff in 1975, which plaintiff had never paid.

1979 savings (one-sixth of saving on one-forth of property at $3.84 tax rate)	$4,977.07	
1980 savings (one-sixth of saving on one-forth of property at $3.84 tax rate)	$4,977.07 (est.)	
TOTAL APPROVED BY PLAINTIFF		$ 9,954.14
GRAND TOTAL		$31,744.29

The actual 1980 tax rate of 4.868, as opposed to the estimated rate, results in a total fee of $33,055.53. The tax savings for 1981, the final year of the benefit of the 1979 appeals, at the North Bergen tax rate of 4.762 would be $6,172.64, rendering a total then due of $39,228.17. As discussed above, Mr. Gittleman retained the sum of $31,968.83. Mr. Gittleman further indicated in his Affidavit that if one examines the actual parcels of property owned by Mr. Mori, as opposed to an arbitrary 75/25 split, then the tax savings to Mr. Mori would be even greater since his property was actually worth more than the 75/25 split.

As is indicated by all of the documents filed by Mr. Gittleman and the Bank of New Jersey,

at all times during the pendency of the Probate proceedings and the Bankruptcy proceedings, the plaintiff was aware of all of the facts which are now the subject of this lawsuit. At no time during any of these proceedings did he assert any claim, nor was Mr. Gittleman notified by plaintiff of any claim against him or the assertion of any entitlement to any funds in any of such proceedings.

Defendant Gittleman's fees, at least to the extent of the Court's orders in the New Jersey probate action. The court approved Mr. Gittleman's fees of $60,804.32 and expenses of $402 and apportioned 75% of that amount as the Bank of New Jersey's share and 25% as plaintiff's. Thus, it is clear that plaintiff was placed on notice of the amount of Mr. Gittleman's fees in the probate proceeding. Indeed, this Court has already held, in ruling on The Bank of New Jersey's motion, that the probate order has res judicata effect. In short, by his silence, plaintiff assented to the reasonableness of Mr. Gittleman's fees, which were set-

tled in the probate matter. Plaintiff, therefore, cannot now dispute the $21,790.15 covered by the intermediate probate accountings.

As for the remaining $9,954.14 which Mr. Gittleman retained for the tax years 1979 and 1980 (2 years after the probate court's approvals), plaintiff is in no better legal position.

Mr. Gittleman's Affidavit establishes that after the probate proceedings concluded, plaintiff not only knew of Mr. Gittleman's continued actions in the tax appeals, but confirmed that Mr. Gittleman, as his attorney, would appeal the erroneous assessments made by the Township of North Bergen. Plaintiff's letter to Mr. Gittleman dated September 23, 1980 and annexed to Mr. Gittleman's Affidavit as Exhibit P, states:

> Also, as we have discussed, I feel the assessments and taxed on North Bergen block ....are excessive. You advised me that you would file appeals on these.

Mr. Gittleman, in fact, filed appeals for those years, obtained substantial reductions, and when he received the drafts from North Bergen, he

retained the approximate sums saved for 1979 and 1980. The percentage charged by Mr. Gittleman, one-sixth of the savings, had previously been approved by the probate court as reasonable.

Most importantly, plaintiff confirmed his arrangements with Mr. Gittleman for years beyond the probate proceedings more than a year after being advised that Mr. Gittleman was retaining these funds for these very years--1979-1980.

Mr. Gittleman did exactly what was asked of him--he filed tax appeals for plaintiff's properties--and the fee he retained was based exclusively on the arrangement plaintiff had agreed to during the probate proceeding and which had been approved as reasonable by the probate court. Plaintiff later confirmed Mr. Gittleman's retention in writing more than one year after being told of Mr. Gittleman's retention of the funds. As a result of plaintiff's acts, or failure to act, in face of all of the information known to him, he was waived and is estopped from asserting any claims against Mr. Gittleman whether for sums approved or not ap-

proved by the probate court.

Plaintiff, by his conduct, led Mr. Gittleman to believe that he approved Mr. Gittleman's acts in preserving plaintiff's tax appeals for 1979 and 1980. Indeed, if Mr. Gittleman did not file and prosecute the tax appeals, plaintiff's right to tax savings in excess of $50,000.00 would have been irretrievably lost. Mr. Gittleman acted in reliance on plaintiff's statements and conduct to prosecute the appeals and plaintiff cannot be heard now to disavow his acts. Plaintiff is estopped from attacking Mr. Gittleman's actions. See, e.g. In re Gravure Paper and Board Corp., 234 F.2d 928 (3d Cir. 1956); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 403 A.2d 880 (1979). To permit plaintiff now to attack Mr. Gittleman's acts of preserving plaintiff's rights and obtaining tax reductions for plaintiff would be unconscionable and inequitable and plaintiff must therefore be barred from raising any claims against Mr. Gittleman. See, e.g., State by Parsons v. U.S. Steel Corp., 22 N.J. 341, 126 A.2d 168 (1956).

Furthermore, plaintiff's acts of continuing to retain Mr. Gittleman after knowing of Mr. Gittleman's retention of the sums set forth in the Bank's letter to plaintiff constitute a waiver of any claims plaintiff may have against Mr. Gittleman. When plaintiff advised Mr. Gittleman that he expected Mr. Gittleman to continue to prosecute the appeals for 1979 and 1980, he unquestionably led Mr. Gittleman to believe that (1) he had no problem with Mr. Gittleman's past acts; and (2) he would compensate Mr. Gittleman in the same manner as then existed and as had been approved by the probate court. Plaintiff thus waived all claims which he may have had against Mr. Gittleman. See, e.g., Mayer v. Development Corp. of America, 541 F.Supp. 828 (D.N.J. 1981); West Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 141 A.2d 782 (1958).

There is an additional reason why plaintiff's claim against defendant Gittleman must fail. Plaintiff did not list his right to this action among his assets during his bankruptcy proceedings.

A bankrupt must file with the court a schedule of all of his property. Bankruptcy Rule 108(a). Further, the bankrupt is under a continuous duty to disclose any new interests arising or acquired within six months after bankruptcy, Rule 108(e). Such supplemental schedules must be filed within ten days of the bankrupt's discovering the information. Id. A cause of action is an asset of the bankrupt estate; as such, it must be disclosed. See, First National Bank v. Lasater, 196 U.S. 115, 25 S.Ct. 206, 49 L.Ed. 408 (1905); Hanover Ins. Co. v. Tyco Industries, Inc., 500 F.2d 654 (3d Cir. 1974); Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982).

During two years of bankruptcy proceedings, plaintiff never once disclosed to the bankruptcy court that he had a claim against Mr. Gittleman. Plaintiff filed his petition April 19, 1979 and his schedule of assets May 14. On June 5, Vincent Gentile wrote to advise plaintiff of Mr. Gittleman's retention of his fee. Yet plaintiff never informed the court that the estate might now

have a cause of action against Mr. Gittleman, notwithstanding that the court twice that summer ordered plaintiff to submit revised schedules. Nor did plaintiff so advise the court at any other time through and including when the court ordered the implementation of a final settlement on May 15, 1981. Now, in this action, plaintiff seeks to assert this claim for the first time. If plaintiff ever possessed a valid cause of action, he has lost it by concealing it during bankruptcy.

The Supreme Court first considered this issue in First National Bank v. Lasater, 196 U.S. 115, 25 S.Ct. 206, 49 L.Ed. 408 (1905). In that case, the Court refused to allow a discharged debtor to assert a claim he had kept secret from the trustee in bankruptcy and the creditors:

> It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any

> action in respect to it. If the claim was of value ... it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.

Id. at 119, 25 S.Ct. at 208.

"Courts, invoking Lasater, generally have not permitted parties asserting title to unlisted causes of action to enforce the claim, because they cannot demonstrate abandonment by the trustee." Stein, 691 F.2d at 891. See, Management Investors v. United Mine Workers of America, 610 F.2d 384, 392 (6th Cir. 1979), Moore v. Slonim, 426 F.Supp. 524 (D.Conn. 1977), aff'd mem., 562 F.2d 38 (2d Cir. 1977). Once a debtor enters bankruptcy, title to his causes of action vests in the trustee, who has the exclusive right to bring a cause of action to aggregate the assets of the estate. Hanover, 500 F.2d 654. Although a bankrupt may bring an action in his own right if the trustee has abandoned it, "when the bankrupt fails to list an asset,

he cannot claim abandonment because the trustee has had no opportunity to pursue the claim." Stein, 691 F.2d at 891.

Here, no trustee was appointed for plaintiff's estate. Instead, the bankruptcy court allowed plaintiff the status of debtor in possession. However, the legal principles are the same as if a trustee had been appointed. The Ninth Circuit decided this very question in November 1982 in Stein, supra. The court's opinion is illuminating:

> The debtor in possession is a fiduciary and owes the same duties as a trustee. Gochenour v. Cleveland Terminals Bldg. Co., 118 F.2d 89, 93 (6th Cir. 1941). The debtor in possession is strictly supervised by the bankruptcy court, and his actions, including abandonment, must be approved. The bankrupt does not act in his own interests until he reverts to his former status upon discharge and confirmation of the plan. The extent of the fiduciary duties should not vary with the identity of the one who performs that role.
>
> The dangers resulting from the concealment of assets are greater when the debtor remains in possession than in cases in

> which a third party acts as trustee. An outside trustee is a separate merchanism for discovering unlisted claims or assets. If a debtor in possession were permitted to omit claims in bankruptcy and later assert title to them, there might be an inducement to do so, to the prejudice of creditors' interests. Such a rule would undermine the fiduciary status of the debtor in possession. Whether or not the failure to list the asset in the case before us was intentional, the opportunity for concealment must be considered in formulating the proper general rule.

691 F.2d at 892.

It is significant that the final order of the bankruptcy court does not list a claim against Mr. Gittleman as one that was preserved to the plaintiff. In contrast, the plaintiff's claim against the Bank of New Jersey, to the extent he had such a claim, was specifically referred to in the bankruptcy court's final order.

But not listing a cause of action against Gittleman among his assets in bankruptcy, plaintiff has lost his right to bring this suit.

I am well aware of the fact that summary judgment is a severe remedy, not to be granted where there is the slightest doubt about any material fact or about movant's right to relief as a matter of law. I have evaluated all of the written materials and oral presentations in the light of that exacting standard and nonetheless conclude that Mr. Gittleman's motion is meritorious.

If the Court agrees, I have attached an appropriate form of order. The granting of summary judgment to defendant Gittleman will leave only the Gittleman counterclaim remaining for trial in this action.

Respectfully submitted,

Dated: June 27, 1984

G. Donald Haneke
United States Magistrate

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5589

EUGENE EWAN MORI,
Appellant

v.

THE BANK OF NEW JERSEY
as Administrator Pendente Lite
of the Estate of Eugene Mori,
Deceased, and MELVIN GITTLEMAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 82-2447)
District Judge: Hon. Clarkson S. Fisher

Submitted Under Third Circuit Rule 12(6)
January 29, 1985
Before: GIBBONS, SLOVITER and VAN DUSEN, Circuit Judges

(Opinion Filed: Jan. 29, 1985)

MEMORANDUM OPINION OF THE COURT

John J. Gibbons
GIBBONS, Circuit Judge:

Eugene Ewan Mori appeals from a summary judgment in favor of defendant Melvin Gittleman, an attorney who represented Mori and his father with reference to real estate tax appeals in North Bergen, New Jersey.[1] Mori contends Gittleman charged excessive fees, and wrongfully misappropriated the proceeds of tax refunds owed to Mori as a lien for legal services provided to him. The district court granted summary judgment on the basis of a United States Magistrate's recommendation that the present action is bared by res judicata and defensive collateral estoppel. United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co., 74 N.J. 92, 376A.2d 1183 (1977); Continental Can Co. v. Hudson Foam Latex Products, 129 N.J. Super. 426, 324 A.2d 60 (App. Div. 1974). A judgment by a probate court allowing an account is res judicata as to all exceptions which could or might have been taken into account. N.J. Stat. Ann. S 3B:17-8 (West 1983). Thus the account determined the reasonableness of fees charged by Gittleman, and that determination binds Mori, a beneficiary who made no exception to it.

Since the reasonableness of the fees was determined in the probate action and Mori is bound by that determination, the court did not err in granting summary judgment.

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1. Summary judgment was entered in favor of the remaining defendants on March 17, 1983. Thus the order appealed from disposes of all claims against all parties. Fed. R. Civ. P. 54(b).

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

John J. Gibbons
Circuit Judge

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NEW JERSEY

EUGENE EWAN MORI,

Plaintiff,

vs.

THE BANK OF NEW JERSEY AS ADMINISTRATOR PENDENTE LITE OF THE ESTATE OF EUGENE MORI, DECEASED and MELVIN GITTLEMAN,

Defendants.

CIVIL ACTION NO. 82-2447W

ORDER FOR SUMMARY JUDGMENT

This matter having been opened to the Court by Kalb, Friedman and Siegelbaum, attorneys for defendant Melvin Gittleman, in the presence of plaintiff, Eugene Ewan Mori, by his counsel, Seymour Wasserstrum, Esq., for an Order granting defendant summary judgment dismissing the complaint with prejudice pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the moving papers and argument of counsel, and the Court being of the opinion that the complaint should be dismissed;

It is on this 10th day of July, 1984

ORDERED, that judgment be and hereby is granted in favor of defendant Melvin Gittleman and against plaintiff Eugene Ewan Mori dismissing the complaint against said defendant with prejudice.

CLARKSON S. FISHER,
CHIEF JUDGE, U.S.D.C.

Mr. Eugene E. Mori

Spring Lake Club Apartments

5400 N.W. 159th Street

Miami, Florida 33014

Attorney Pro Se

EUGENE EWAN MORI,

Plaintiff

vs.

THE BANK OF N.J. AS ADMINISTRATOR PENDENTE LITE OF THE ESTATE OF EUGENE MORI, DECEASED, and MELVIN GITTLEMAN,

Defendants.

U.S. DISTRICT COURT FOR THE DISTRICT OF N.J.

HONORABLE CLARKSON S. FISHER

Civil Action # 82-2447-W

NOTICE OF APPEAL TO A CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

NOTICE IS HEREBY GIVEN that EUGENE EWAN MORI, above named plaintiff, hereby appeals to the United States Court of Appeals for the Third Circuit, from the Order for Summary Judgment entered in this action on July 10, 1984, by Honorable Clarkson S. Fisher, U.S.D.C.. whereby Judge Fisher granted Summary Judgment in favor of defendant MELVIN GITTLEMAN.

Dated: August 7, 1984

EUGENE E. MORI
Attorney Pro Se